Supreme Court, U.S.
FILED
AUG 4 2003
OFFICE OF THE CLERK

No. 03-196

In The Supreme Court of the United States

EDWARD L. MOSKAL,
Petitioner,
v.
DELPHI AUTOMOTIVE SYSTEMS, INC.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

1. Whether the District Court and the Sixth Circuit Court of Appeals erred by determining that summary judgment was properly granted. This Court should directly determine an important issue arising under the Americans with Disabilities Act. Specifically, did the failure of the defendant-employer to provide an alternative drug screening process to a person suffering from Alopecia Universalis constitute discrimination under the statute.

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OPINION BELOW

The Sixth Circuit Court of Appeals filed its decision with the Clerk of Courts on May 6, 2003. The decision is unreported.

JURISDICTION

The Sixth Circuit Court of Appeals filed its decision with the clerk on May 6, 2003. This Court has jurisdiction under 28 U.S.C. 1254 to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act prohibits discrimination in employment based upon a "disability" which is defined in 42 U.S.C. 12102(2). Pursuant to this statute, a "disability" means, in part, a physical or mental impairment that substantially limits one or more of the individual's major life activities. 42 U.S.C. section 12111(8) defines the term "qualified individual with a disability." The term "qualified individual with a disability" means an

individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. 42 U.S.C. Section 12111(9) defines the term "reasonable accommodation" The term "reasonable accommodation" may include- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

STATEMENT OF THE FACTS

Moskal was working at the Delphi Automotive System, Inc. plant in Sandusky, Ohio as a contract designer,

for approximately nine months. Through a lottery system, he became eligible as a potential hire for a regular production position. Moskal passed all the preliminary tests and was orally informed that he would be hired on June 25, 1999. The last step for hiring was to take a physical exam and pass a drug screen.

On June 25, 1999, Moskal met with the company doctor. The doctor inquired about the scars that he had on his back. Moskal explained to him that he had Muscular Dystrophy and the scars were from a scapular fusion to help with his condition. The company doctor did not understand this common condition. The Plaintiff explained that the scapular was fused to his rib cage. That specific condition did and does not limit his ability to perform his job.

Moskal also informed the company doctor that he also suffered from the common medical condition of "Alopecia Universalis." This is a condition in which Moskal and others have absolutely no hair on any part of the body. He explained that he could not take the drug screen using hair sample testing. The company doctor told him that in order to perform the screen he could get the hair from his groin or under his arms. Moskal again had to explain to the uninformed company nurse and doctor that this could not be done. The small degree of agitation that the doctor or nurse observed in Moskal was caused by and due to the ignorance of the company medical personnel.

A nurse took Moskal's blood pressure, which was

slightly elevated at 92/136. The company doctor told Moskal that he could not pass him for his physical until he brought a letter from his family doctor confirming that he did not have high blood pressure. The company doctor failed to comprehend that the slightly elevated blood pressure stemmed from his Muscular Dystrophy condition.

In order to satisfy the doctor, Moskal went directly to his private doctor's office. Dr. Robert W. Minnick, provided him with a letter stating that he did not suffer from hypertension. Moskal immediately took the letter back to the company doctor the very same day.

Moskal then went home, without having a drug test using body hair, thinking that he would start his job on Monday, June 28, 1999. At 7:00 p.m. on June 25, 1999, Moskal received a phone call from Edward Meeks, Salary Personnel Manager, who informed him that due to some unspecified "concerns," he could not start on Monday, June 28, 1999. Moskal was informed that he was to continue designing for Delphi in his contract job.

On June 28, 1999, when Moskal came to work, he immediately proceeded to speak to Mr. Meeks. Again, he told him that there were some unspecified "concern" and that he needed to speak with other personnel.

During that week, the company doctor requested more specific information from Moskal's doctor, concerning whether or not he suffered from hypertension. Moskal's private doctor again provided the company with the

information, drafted in the manner the company doctor called for.

Approximately three weeks later, the company doctor stated that Moskal seemed argumentative at his physical and ordered that he see a psychiatrist. Moskal met with the psychiatrist for three to four hours. That company psychiatrist approved him for employment. This psychiatric evaluation was not a part of the general employment process. It was unnecessary and was designed to humiliate Mr. Moskal. The delay in employment was due to the company doctors' lack of medical knowledge concerning Muscular Dystrophy and Alopecia, and his poor language skills. The psychiatric evaluation was uncalled for, unnecessary and not a standard part of the pre-employment process.

Approximately one week after this event, Moskal was finally given a drug test using a urine sample. Evidently, he was drug free as he was hired by defendant company on August 2, 1999.

In his complaint, Moskal sought monetary damages for lost and increased wages for the time period between June 28, 1999 and August 2, 1999. Had Moskal been hired by Delphi on June 28, 1999, he would have enjoyed "flow back" rights which would have enabled him to have the ability to transfer to any General Motor's facility, worldwide. Presently, he has no such right.

The District Court granted the defendant's motion for summary judgment. The plaintiff then took an appeal of that

judgment to the Sixth Circuit Court of Appeals which affirmed the judgment of the District Court.

REASONS FOR GRANTING THE PETITION

1. **WHETHER THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS ERRED BY DETERMINING THAT SUMMARY JUDGMENT WAS PROPERLY GRANTED. THIS COURT SHOULD DIRECTLY DETERMINE AN IMPORTANT ISSUE ARISING UNDER THE AMERICANS WITH DISABILITIES ACT. SPECIFICALLY, DID THE FAILURE OF THE DEFENDANT-EMPLOYER TO PROVIDE AN ALTERNATIVE DRUG SCREENING PROCESS TO A PERSON SUFFERING FROM ALOPECIA UNIVERSALIS CONSTITUTE DISCRIMINATION UNDER THE STATUTE.**

The District Court and the Sixth Circuit Court of Appeals erred by determining that summary judgment was properly granted. Moskal did establish a prima facie case of disability discrimination in that he established his disability, that he was qualified for the position and his employer refused to make a reasonable accommodation for his known disability. Disability is defined in the statute as a physical or

mental impairment which substantially limits a major life activity. In this modern day life, a major life activity includes the ability to take and pass a drug screen in order to obtain employment. The District Court and the Sixth Circuit Court of Appeals incorrectly limited the scope of "major life activities" in dismissing Moskal's claims. His known disability of having no body hair to provide to an employer for purposes of fulfilling a pre-employment drug screen and the refusal of the employer to provide a reasonable accommodation of a urine test constitutes discrimination due to a known disability. Delphi agents did nothing to acquaint themselves with this common medical condition despite their requirement to do so. Taylor v. Pathmark Stores Inc., 177 F.3d 180 (3rd Cir. 1999)

Therefore, this Court should reexamine the decision of the Trial Court to grant the motion for summary judgment and the Court of Appeals order affirming the dismissal of Moskal's case. Lucas v. Monroe County, 203 F.3d 964 (6th Cir. 2000); Smith v. Ameritech, 129 F.3d 857 (6th Cir. 1997); Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir. 1996).

CONCLUSION

Edward Moskal has a known disability in that he suffers from the common medical condition of Alopecia

Universalis. As part of the hiring process, the defendant demanded that he fulfill a condition of employment of passing a drug screen by providing body hair. The defendant failed to provide the reasonable accommodation of permitting Moskal to provide a urine sample. These actions constitute discrimination due to a known disability and Moskal suffered measurable damages as a result of the defendant's actions. The inability to provide a hair sample to fulfill a pre-employment drug screen is a major life activity. The failure of the employer to provide an alternative urine test constitutes a failure to accommodate a known disability. This Court should grant the Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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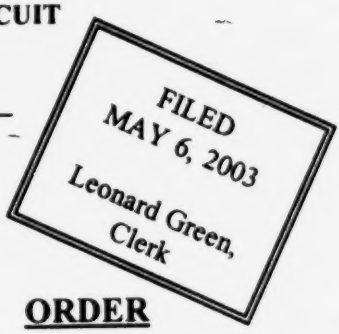
CASE Nº 02-3887

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT



EDWARD L. MOSKAL,	)	
Plaintiff-Appellant,	)	
v.	)	**ORDER**
DELPHI AUTOMOTIVE	)	
SYSTEMS, INC.,	)	
Defendant-Appellee.	)	

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Before: NELSON and COLE, Circuit Judges; ROSEN, District Judge. *

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

Edward L. Moskal, represented by counsel, appeals a district court judgment dismissing his civil rights complaint filed pursuant to the Americans with Disability Act (ADA), *42 U.S.C. § 12101-117*. The parties have expressly waived oral argument, and this panel unanimously agrees that oral argument is not needed. *Fed. R. App. P. 34(a)*. [*2]

By way of background, Moskal was employed as a contract worker at Delphi Automotive Systems, Inc. (Delphi), and he became eligible as a potential hire for an hourly production position. As part of the pre-employment selection process, Moskal was required to submit to a physical examination and drug screening, that was conducted on June 25, 1999. Delphi generally performed the drug screening test using a hair sample.

During the physical examination, Moskal explained that he had hemifacial scapular muscular dystrophy (MD) and Alopecia Universalis (the absence of all body hair). The physical exam revealed an elevated blood pressure reading, and the plant physician (Dr. Luna) requested that Moskal's treating physician (Dr. Minick) verify that Moskal did not suffer from hypertension. Moskal became agitated during the examination, and Dr. Luna also requested that Moskal undergo psychological testing prior to being hired. On that same day, Moskal brought an initial letter from Dr. Minick concerning his blood pressure. After

Dr. Luna requested more definitive information, Moskal provided another letter on July 9, 1999, following a two-week evaluation conducted by Dr. Minick. Subsequently, [*3] Moskal completed a psychological examination, and a report was issued on July 29, 1999. The drug screening test was eventually completed using a urine sample. Thereafter, Moskal was cleared to work, and he began his employment as an hourly worker on August 2, 1999.

In September 2001, seeking monetary and equitable relief, Moskal sued Delphi claiming that Delphi had discriminated against him on the basis of his known disability. Essentially, he argued that his Alopecia Universalis constitutes a disability, and that Delphi failed to make a reasonable accommodation for his disability by not permitting him to take the drug screening test using a urine sample on the same day that a hair sample would have been taken, i.e., June 25, 1999. He alleged that the delay in testing and hiring caused him to lose a month of seniority and other employment benefits. Although Moskal made numerous references to his MD, he did not describe how Delphi discriminated against him based on this condition, how his MD constitutes a disability, or how Delphi could have "accommodated" the condition. Upon review, the district court concluded that Moskal's Alopecia Universalis did not constitute a disability for [*4] purposes

of the ADA, and it granted summary judgment to Delphi. Moskal has filed a timely appeal, reasserting his claim.

Upon review, we conclude that the district court properly granted summary judgment to the defendant. This court reviews a district court's grant of summary judgment de novo; it uses the same test as used by the district court. *See Lucas v. Monroe County, 203 F.3d 964, 971 (6th Cir. 2000)*. To establish a prima facie case of disability discrimination, Moskal must show that: 1) he has a disability; 2) he is "otherwise qualified" for the job; and 3) the defendants either refused to make a reasonable accommodation for his disability or made an adverse employment decision regarding him solely because of his disability. *See Smith v. Ameritech, 129 F.3d 857, 866 (6th Cir. 1997)*. The ADA defines "disability" as a physical or mental impairment that substantially limits one or more of an individual's major life activities. *See Roush v. Weastec, Inc., 96 F.3d 840, 843 (6th Cir. 1996)* (citing *42 U.S.C. § 12102(2)(A)*). Major life activities include "caring for oneself, performing manual tasks, walking, [*5] seeing, hearing, speaking, breathing, learning and working." *See id.* (citing *29 C.F.R. § 1630(i) (1995)*). An individual is considered to have a "disability" if either 1) he has an impairment that substantially limits one or more of his major life activities; 2) there is a record of such an

impairment; or 3) he is regarded by his employer as having such an impairment. *See 42 U.S.C. § 12102(2).*

Moskal did not establish a prima facie case of disability discrimination because he did not show that he has a "disability" as that term is defined in *42 U.S.C. § 12102(2).* Under this statute, a 'disability' means

> (A) a physical or mental impairment that substantially limits one or more of the [individual's] major life activities ...;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

Moskal acknowledged that his Alopecia Universalis does not prevent him from engaging in such activities as driving, walking, sleeping, sitting, standing, interacting with his family, getting dressed, thinking, speaking, breathing, seeing, or lifting. Moskal also acknowledged that his condition [*6] does not affect his ability to perform one of the most physically demanding jobs at Delphi without accommodation. In addition, Moskal presented no evidence of a record of the kind of impairment spoken of in the statute and no evidence that Delphi regarded him as being substantially impaired in any major life activity. Hence,

Moskal cannot establish that he has a disability for purposes of the ADA. *See Roush, 96 F.3d at 843.*

Accordingly, we affirm the district court's judgment.

ENTERED BY ORDER OF THE COURT

/S/ LEONARD GREEN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

EDWARD L. MOSKAL,

Plaintiff, **Case No.: 3:01 CV 7510**

-vs- **MEMORANDUM OPINION**

DELPHI AUTOMOTIVE SYSTEMS, INC.,

Defendant.

FILED
JULY 8, 2003
Northern District
of Ohio

KATZ, J.

Pending before this Court is Defendant's Motion for Summary Judgment (Doc. No. 12). Based upon careful consideration of Defendant's motion, Plaintiff's opposition, Defendant's reply, and the entire record herein, the Court will grant summary judgment to Defendant.

I. BACKGROUND

Plaintiff, Edward L. Moskal, while working as a contract worker at Defendant Delphi Automotive Systems,

Inc. ("Delphi"), became eligible through a lottery system as a potential hire for an hourly production position. As part of the selection process, Plaintiff was required to submit to a pre-employment physical exam and drug screening, which was conducted on June 25, 1999.

During physical examination, Plaintiff revealed that he has mild hemifacial scapular muscular dystrophy ("MD"). The physical exam also revealed an elevated blood pressure reading, so the plant physician, Dr. Luna, requested that Plaintiff's treating physician, Dr. Minick, verify that Plaintiff did not suffer from hypertension. Dr. Minick monitored Plaintiff's blood pressure for approximately two weeks to provide a definitive diagnosis. During Dr. Luna's examination, Plaintiff became agitated, so Dr. Luna requested that Plaintiff undergo psychological testing prior to being hired. To complete the drug screening, a plant doctor requested a hair sample. Plaintiff suffers from alopecia universalis,[1] and thus was unable to provide the requested hair

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[1] Alopecia generally refers to the absence or loss of hair, most often on the scalp. The most severe form of the disease, alopecia universalis, results in the loss of all scalp and body hair, including the eyelashes and eyebrows. The hair loss is often permanent and there is no known cure. Alopecia can result from physiological changes as a part of the aging process, serious illness, drugs, endocrine disorders, certain forms of dermatitis, hereditary factors, or radiation. *Hendley*

sample. Drug screening did not take place on the day of the exam, but was eventually completed with a urine sample.

Plaintiff brought an initial letter from Dr. Minick regarding Plaintiff's blood pressure on June 25, 1999, and then provided a nother letter on July 9 after the two-week evaluation period set forth by Dr. Minick. Plaintiff completed a psychological examination administered by Dr. Stratton, who issued a report dated July 29, 1999. Once the issues of elevated bold (sic) pressure, psychological testing, and drug screening were resolved, Plaintiff was cleared to work. Plaintiff was selected for a position and commenced employment as an hourly worker on August 2, 1999. Plaintiff continues to be employed as a Delphi Employee.

Plaintiff, though ultimately hired for the position he sought, complains that he was not tested and ultimately hired in a timely enough fashion. Plaintiff assumed he would complete the pre-employment screening on June 25, and then begin work on June 28, but instead was not hired until August 2. Plaintiff is primarily concerned because a hiring date approximately one month earlier would have qualified Plaintiff for certain seniority benefits. Dissatisfied with the manner in which his pre-employment evaluation was

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v. South Carolina State Budget & Control Bd., 481 S.E.2d 159, 160-61 (S.C. Ct. App. 1996) (citing TABER'S CYCLOPEDIC MEDICAL DICTIONARY, 73-74 (17th ed. 1989)).

conducted, Plaintiff filed a charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC"), received a right to sue letter on June 25, 2001, and subsequently filed suit on September 21, 2001.

The Complaint before this Court alleges disability discrimination due to Defendant's failure to accommodate Plaintiff's impairments, in violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq*. Plaintiff bases his claim on the theory that his alleged impairment, alopecia, substantially limited his ability to provide a hair sample for drug screening, which Plaintiff submits should be regarded as a major life activity under the ADA. Plaintiff specifically asserts that Defendant failed to make a reasonable accommodation for the alopecia universalis in that the urine sample could have been taken the same day that the hair sample would have been taken, but that Dr. Luna's ignorance and prejudice regarding Plaintiff's condition caused a delay in testing and hiring, which in turn caused Plaintiff to loose (sic) a valuable one month's seniority. Plaintiff also makes frequent reference to his MD, but does not explain how the condition was not accommodated, or otherwise renders him disabled.

A. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the initial responsibility of "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed.2d 265 (1986). The movant may meet this burden by demonstrating the absence of evidence supporting one or more essential elements of the non-movant's claim. *Id.* at 323-25. Once the movant meets this burden, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2541, 91 L. Ed.2d 202 (1986) (*quoting* FED R. CIV. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 538 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553; *see also Harris v. General*

Motors Corp., 201 F.3d 800, 802 (6th Cir. 2000). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552.

"In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences therefrom in a light most favorable to the nonmoving party." *Williams v. Belknap*, 154 F. Supp.2d 1069, 1071 (E.D. Mich. 2001) (citing *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987)). However, "'at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter,'" *Wiley v. U.S.*, 20 F.3d 222, 227 (6th Cir. 1994) (quoting *Anderson*, 477 U.S. at 249); therefore, "[t]he Court is not required or permitted to judge the evidence or make findings of fact." *Williams*, 154 F. Supp.2d at 1071. The purpose of summary judgment "is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried." *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 130 F. Supp.2d 928, 930 (S.D. Ohio 1999). Ultimately, this Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52; *see also Atchley v. RK Co.*, 224 F.3d 537, 539 (6th Cir. 2000).

B. Defendant's Motion for Summary Judgment

Defendant has moved for summary judgment on the one count complaint, asserting (1) Plaintiff is not disabled as defined by law, (2) Plaintiff did not suffer any adverse employment action due to his alleged disabilities, and (3) Plaintiff cannot establish that Defendant's reasons for the delay in hiring were a pretext for discrimination. As the Court agrees with Defendant that Plaintiff is not "disabled" within the meaning of the ADA, the Court need not reach the merits of Defendant's other arguments.

C. ADA provisions

The ADA requires an employer to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

To prevail on his failure to accommodate claim, Plaintiff must establish: "(1) that he is disabled; (2) that he is qualified for the job with or without reasonable

accommodation; and (3) that he was denied a reasonable accommodation." *Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997).

Under the ADA:

> The term "disability" means, with respect to an individual –
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102 (2)(A)-(C).

To qualify as disabled under subsection (A), Plaintiff must preliminarily establish that he has a physical or mental impairment. Drawing upon the Rehabilitation Act regulations issued by the Department of Health, Education, and Welfare ("HEW"), the Supreme Court has explained that a physical impairment means "'any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.'" *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 122 S. Ct.

681, 690 (2002), (quoting 45 C.F.R. § 84.3 (j)(2)(i)).

Even assuming that Plaintiff's MD and alopecia universalis are properly regarded as a physical impairment, Plaintiff must still demonstrate that these impairments "limit a major life activity." *Id.* (citing 42 U.S.C. § 12102(2)(A)). As noted by the Supreme Court, "[t]he HEW Rehabilitation Act regulations provide a list of examples of 'major life activities,' that includes 'walking, seeing, hearing,' and . . . 'performing manual tasks.'" *Id.* (citing 45 C.F.R. § 84.3(j)(2)(ii).

Plaintiff would have the Court regard the providing of a hair sample for an employment related drug screening as a major life activity. The Supreme Court has made clear that "'[m]ajor' in the phrase 'major life activities' means important. [. . .] 'Major life activities' thus refers to those activities that are of central importance to daily life." *Id.* The Court has also instructed that "these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled." *Id.* This Court does not regard providing a sample to be on par with walking, sitting, standing, seeing, hearing, and other activities that courts have categorized a (sic) major life activities.

Moreover, Plaintiff does not submit that he is substantially limited as to any of these other major life activities. To the contrary, Plaintiff has repeatedly asserted that neither his MD nor alopecia universalis substantially impede his ability to work, walk, see, drive, sleep, sit, stand,

dress, think, speak, breathe, or any other of a number of activities. Plaintiff has admitted that he has a physically demanding job with Defendant, yet requires no accommodation to perform his duties.

In addition, Plaintiff does not provide any evidence of a record of impairment, so as to qualify as disabled under subsection (B). Nor does he submit any compelling evidence that he was regarded as having an impairment, and thus the Court does not regard subsection (C) as applicable to the instant case. As Plaintiff does not demonstrate that he is properly regarded as disabled under the ADA, the Court will grant summary judgment to Defendant.

III. CONCLUSION

Based on the foregoing, the Court will grant Defendant's Motion for Summary Judgment (Doc. No. 12) as to the entirety of Plaintiff's claims.

IT IS SO ORDERED.

/S/ *David A. Katz*
DAVID A. KATZ
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

EDWARD L. MOSKAL,

Plaintiff, **Case No.: 3:01 CV 7510**

-vs-

JUDGMENT ENTRY

DELPHI AUTOMOTIVE SYSTEMS, INC.,

Defendant.

FILED
JULY 8, 2003
Northern District
of Ohio

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, **IT IS HEREBY ORDERED, ADJUDGED** and **DECREED**, that Defendant's Motion for Summary Judgment (Doc. No. 12) is granted. Case closed.

/S/ *David A. Katz*
DAVID A. KATZ
U.S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
SEP 2 2003
OFFICE OF THE CLERK

No. 03-196

In the Supreme Court of the United States

EDWARD L. MOSKAL,

Petitioner,

v.

DELPHI AUTOMOTIVE SYSTEMS, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT DELPHI AUTOMOTIVE SYSTEMS, INC.'S BRIEF IN OPPOSITION TO EDWARD MOSKAL'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Edward Moskal applied for a bargaining unit job with respondent Delphi Automotive Systems, Inc. ("Delphi") in 1999. He was hired once he completed all pre-hire requirements, including a physical examination and drug screen. He presented for the exam and drug test on June 25, 1999. He was unable to complete all aspects of the physical exam at that time; among other things, he was unable to provide a hair sample for a drug test due to his alopecia universalis condition (total loss of hair). In the following weeks, he was able to complete the physical exam and drug test through alternate means (e.g., a urine sample). He was hired on August 2, 1999, and continues to work for Delphi.

Moskal asserted that the delay in his hire date constituted discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., due to his purported disabilities of alopecia and hemifacial scapular muscular dystrophy ("MD"). The District Court found that Moskal was not disabled as defined by the ADA and Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), and the Sixth Circuit affirmed.

The Petition raises the following issue:

(1) Did the Court of Appeals for the Sixth Circuit reversibly err in affirming the District Court's grant of summary judgment in favor of Delphi as to Moskal's claim of disability discrimination under the ADA, when the undisputed evidence (including plaintiff's own admissions in deposition testimony) established that he was not substantially limited in any major life activity.

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RESPONDENT DELPHI AUTOMOTIVE SYSTEMS, INC.'S BRIEF IN OPPOSITION TO EDWARD MOSKAL'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Court of Appeals for the Sixth Circuit and the U.S. District Court for the Northern District of Ohio accurately stated the pertinent, undisputed facts related to Moskal's claim. [Pet'r App. A1-A6, B1-B10]. Briefly, Moskal applied for a job with Delphi in 1999, completed the pre-hire requirements (including a physical examination and drug test), was hired, and has worked for Delphi since August 2, 1999. His assertion below was that he should have been hired about three weeks earlier, prior to completing all pre-hire requirements.

I. CLARIFICATION OF THE RECORD

The "facts" recited in the Petition bear little resemblance to the record facts below. [Pet'r App. B-1-B-4]. Delphi never guaranteed that Moskal would be hired. Delphi never guaranteed that his application for employment would be processed within any period of time. As part of the application process, Moskal, like all potential employees, was required successfully to complete a physical examination and drug screening. The exam took place on June 25, 1999. Delphi generally performed drug tests using a hair sample.

At the examination, Moskal stated to Delphi's plant physician Dr. Luna that Moskal had hemifacial scapular muscular dystrophy ("MD") and alopecia universalis (the absence of all body hair). Moskal also presented with elevated blood pressure and became agitated during the examination. The plant physician required that Moskal's

treating physician verify that Moskal did not suffer from hypertension. Due to his agitated state, Dr. Luna also required Moskal to undergo psychological testing prior to being hired.

At the examination, Moskal was unable to provide a hair sample for the drug test. Due to the need to monitor Moskal for possible hypertension and to conduct psychological testing, Delphi did not go forward with alternate drug testing on June 25, 1999.

Later on June 25, 1999, Moskal brought a letter from his treating physician, Dr. Minick, stating that Moskal did not appear to suffer from hypertension, but further indicating that Dr. Minick would monitor Moskal's blood pressure for a couple of weeks. On July 9, 1999, Dr. Minick reported the results of his monitoring, i.e., that Moskal did not suffer from hypertension. Subsequently, Moskal underwent psychological testing and a report was provided to Delphi on July 29, 1999. During this same period, Delphi also proceeded with Moskal's drug testing through alternate means; on July 20, 1999, he was asked to and did provide a urine sample, and was able successfully to complete the drug screening. Once he completed all pre-hire requirements, Moskal was hired. He began work for Delphi on August 2, 1999, and continues to be a Delphi employee.

II. MOSKAL'S ASSERTED CLAIM

Moskal asserted that he was discriminated against in violation of the ADA because Delphi did not immediately provide for an alternate drug test. Moskal ignores the fact that he was unable to complete several aspects of the pre-hire physical examination on June 25, 1999 (e.g., monitoring his possible hypertension, psychological testing, and drug

screening). Moskal also disregards the fact that, within a few weeks, Delphi provided for an alternate drug test, enabling him to begin work on August 2, 1999.

REASONS FOR DENYING THE WRIT

I. MOSKAL HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." Id. Moskal has not presented any compelling reason for this Court to exercise discretionary jurisdiction over his attempted appeal of the dismissal of his claim. Indeed, his key complaint, that he should have been provided an alternate drug test on June 25, 1999, was squarely addressed by the Courts below.

Moskal asserted that his alopecia substantially limited his ability to provide a hair sample for the drug test, and that this test should be considered a major life activity.[1] The District Court found that providing a hair sample for an employment related drug screening was not a major life activity. [Pet'r App. B-9]. Moskal's inability to complete the drug screen on June 25, 1999, did not render him substantially limited in a major life activity, a requirement to establishing a claim under the ADA. [Id.] Other than his own conclusory assertion to the contrary, Moskal offers no reason to disregard and

[1] Moskal has not stated in his Petition, and had not argued in the courts below, how his MD allegedly had an impact on the timing of his hire.

reevaluate this decision. He also identifies no conflict in the circuit (or other) courts on this issue, nor could he.

II. THE LOWER COURTS DID NOT ERR IN DECIDING THIS CASE

In addition, summary judgment was properly entered against Moskal. He failed to submit any evidence that either his MD or alopecia constituted a disability under the ADA. The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the [individual's] major life activities..." 42 U.S.C. § 12102(2). [Pet'r App. A-5]. Moskal admitted in deposition that he was not substantially limited in any of his major life activities, including driving, walking, sleeping, sitting, standing, interacting with his family, getting dressed, thinking, speaking, breathing, seeing, and lifting. He admitted that he was able to perform one of the most physically demanding jobs at Delphi without accommodation.

Further, the lower courts properly followed this Court's decision in Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), in finding that Moskal failed to establish that he was disabled under the ADA. In Toyota, this Court instructed that "major life activity" "be interpreted strictly to create a demanding standard for qualifying as disabled." Id. at 197. A major life activity must be "of central importance to daily life." Id. See also 29 C.F.R. §1630.2(i) (defining major life activities to include walking, seeing, hearing, breathing, and caring for oneself). This Court further found that "[i]t is insufficient for individuals attempting to prove disability status . . . to merely submit evidence of a medical diagnosis of an impairment"; rather, an ADA claimant must prove that his physical limitations due to his alleged disability are "substantial." Toyota, 534 U.S. at 198.

The lower courts appropriately ruled that Moskal failed to meet his burden of proof. [Pet'r App. A-5-A-6; B-9-B-10]. Moskal admitted that he was not substantially limited in any way due to his MD or his alopecia. Therefore, he was not disabled under the law. Moskal presents no reason to reevaluate this decision. Moreover, his Petition cites no contrary (or more recent) authority to discredit the lower courts' proper reliance on Toyota.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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